Chicago-Kent Law Review

Volume 75
Issue 1 *Symposium on Legal Disputes Over Body Tissue*

Article 9

December 1999

Between Pretext Plus and Pretext Only: Shouldering the Effects of Pretext on Employment Discrimination after St. Mary's Honor Center v. Hicks and Fisher v. Vassar College

Stefanie Vines Efrati

BETWEEN PRETEXT PLUS AND PRETEXT ONLY: SHOULDERING THE EFFECTS OF PRETEXT ON EMPLOYMENT DISCRIMINATION AFTER *ST. MARY'S HONOR CENTER V. HICKS* AND *FISHER V. VASSAR COLLEGE*

STEFANIE VINES EFRATI*

INTRODUCTION

Sometimes a court's adherence to a particular doctrine subverts the court's reasoning and undermines its conclusions. Courts that take a strict position on an issue can miss important considerations that do not adhere to the hard-line position. As a result, a court's well-meaning intention to substantively conform its position to a particular interpretation of the law can lead to misguided decisionmaking.

One such issue that demonstrates the problems that arise when courts take a hard-line position is the issue of pretext in employment discrimination cases. A finding of pretext arises when a plaintiff proves that an employer's given reason for dismissal or action taken is actually false. The two major positions that a court can choose to take are the "pretext plus" or the "pretext only" positions. The pretext plus position is the view that the plaintiff must show pretext plus proof of the employer's discriminatory animus to meet the burden of proof for a finding of employment discrimination. The pretext only position requires a finding of a prima facie case of discrimination, plus a finding that the employer's proffered reasons for dismissal are pretextual to satisfy a finding of employment discrimination. The main difference between the two positions is that the pretext plus position is a tougher standard for plaintiffs, requiring proof of the employer's discriminatory intent, while the pretext only position only requires proof of a pretext by the employer, not actual discriminatory intent.

* J.D., Brooklyn Law School, 1999; B.A., University of Michigan, 1994. The author currently is an associate at Wilson, Elser, Moskowitz, Edelman and Dicker, L.L.P. in New York, practicing insurance defense and commercial litigation.

One case addressing both the pretext plus and pretext only positions, *Fisher v. Vassar College,* demonstrates the problems that are inherent in advocating a strict interpretation of the law when a case falls between the constraints of two positions.[1] In *Fisher*, the Second Circuit addressed the issue of the meaning of a sustainable finding of pretext in an employment discrimination case and announced the standard to be applied to appellate review of district court findings of employment discrimination.[2] The particular issue decided by the sharply divided en banc court was whether a finding of discrimination based upon a prima facie case and a supportable finding of pretext could be reversed on appeal as clearly erroneous.[3] The majority held that a finding of pretext, together with a prima facie case, still does not insulate a finding of discrimination from appellate review. In contrast, the dissent suggested that a finding of pretext almost always supports a finding that the employer's true motivation was discriminatory.[4]

This Note addresses problems with both the majority's and dissent's views in *Fisher* regarding the correct standard for a finding of pretext in employment discrimination cases. The *Fisher* en banc majority advocated the pretext only standard, while the dissent championed the pretext plus view. Both the majority and dissent reflect the problems that are inherent when the court tries to adopt a bright-line rule for the issue of pretext.

In *St. Mary's Honor Center v. Hicks*, the Supreme Court held that a plaintiff in an employment discrimination suit must prove both a prima facie case of discrimination,[5] and that the pretextual reason offered by the employer is really a disguise for the employer's actual discriminatory animus.[6] However, it is unclear whether the Supreme Court majority "intended to adopt the pretext plus position in its starkest form: that pretext only is never sufficient to permit a finding of discrimination,"[7] or whether a finding of a prima facie case of discrimination plus proof that the employer's proffered reason for the dismissal is pretextual is sufficient to meet the burden of proof for a

1. 114 F.3d 1332 (2d Cir. 1997).
2. *Id.*
3. *See id.*
4. *See id.* at 1333, 1342-43.
5. 509 U.S. 502, 519-20 (1993).
6. *Id.*
7. *Development in the Law-Employment Discrimination: Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1592 (1996) [hereinafter *Development*].

finding of employment discrimination.[8]

Part I explains the difference between the pretext plus and pretext only positions. Part II of this Note sets out the factual and procedural background to the issues raised in *Fisher*, and details the reasoning of the majority and dissenting opinions. Part III examines the Supreme Court's treatment of the burden of proof in employment discrimination cases and explains the ambiguity surrounding the pretext only versus pretext plus controversy. Part IV analyzes the *Fisher* en banc majority's preference for a pretext plus burden of proof and its conclusion that pretext only is not always sufficient to satisfy the burden of proof for a finding of employment discrimination. Part IV also analyzes the dissent's adoption of the pretext only position that a finding of a prima facie case of discrimination coupled with proof of the employer's pretextual reasons for the plaintiff's dismissal usually satisfies the burden of proof for a finding of employment discrimination. Part V looks at the *Hicks* decision on pretext in employment discrimination cases, and what interpretation of the law is correct. Part V applies the Supreme Court's rationale in *Hicks* to *Fisher* and explores the lingering negative consequences that result from strict adherence to either the pretext plus or pretext only positions. This Note concludes that neither the en banc majority's pretext plus preference nor the dissent's pretext only position is completely satisfactory as a bright-line rule for deciding the burden of proof in employment discrimination cases.

I. DISTINGUISHING BETWEEN PRETEXT ONLY AND PRETEXT PLUS

The difference between the pretext only and pretext plus positions is significant. Until the Supreme Court's 1993 ruling in *Hicks*, most lower courts took the pretext only view that a plaintiff who presented facts creating a plausible inference of discrimination, and who then went on to show that the employer's explanation for its action was a pretext, was generally entitled to win the case.[9] In the *Hicks* case, however, the Supreme Court held that the plaintiff not only must undermine the credibility of the employer's explanation, but also must actually prove intentional discrimination,[10] a position that has been called pretext plus. Despite the ruling, there has not

8. *See Hicks*, 509 U.S. at 511.
9. *Id.* at 502.
10. *Id.* at 502-03.

been strict adherence to the *Hicks* position because the Supreme Court did not explain precisely how plaintiffs can prove intentional discrimination. As a result, lower courts have been divided on the issue of pretext.

Before *Hicks*, a plaintiff in a pretext only circuit was entitled to judgment as a matter of law if he could prove that the employer's reason was not believable.[11] After *Hicks*, in a pretext plus jurisdiction, the plaintiff cannot prevail merely by disproving the employer's reason.[12] Instead, the plaintiff must establish that the real reason for the employer's action was discrimination.[13] According to the pretext plus position, the plaintiff's proof of pretext does not amount to proof of intentional discrimination.[14] All that is shown by disproof of the employer's proffered reason is that the employer misrepresented the true reasons for the action, not that the employer violated Title VII.[15] As a result of this higher standard of proof, a plaintiff who would have received judgment as a matter of law by proving that the employer's reasons for action were false in a pretext only jurisdiction would lose for failing to meet his burden of proof in a pretext plus jurisdiction.

II. *FISHER V. VASSAR COLLEGE*: FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

Dr. Fisher was a fifty-five-year-old, married woman when she was denied tenure.[16] She held a Bachelor's degree from the University of Wisconsin, and Master's and Ph.D. degrees in Zoology from Rutgers University.[17] Dr. Fisher engaged in post doctoral work at Rutgers Medical School from 1963 to 1965.[18] After she finished her academic work in 1965, she returned home with her daughters.[19] In 1974, she returned to teaching biology at Marist College.[20] In 1977,

11. *Id.* at 526 (Souter, J., dissenting).
12. *Id.* at 502.
13. *See id.* at 511.
14. *See Development*, *supra* note 7, at 1591-92.
15. *See id.* at 1579.
16. *See* Fisher v. Vassar College, 852 F. Supp. 1193, 1197 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 70 F.3d 1420 (2d Cir. 1995), *rev'd*, 114 F.3d 1332 (2d Cir. 1997).
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 1197.

she began working at Vassar College as a Visiting Assistant Professor in the Biology Department.[21] She remained in the Biology Department and was promoted to a tenure-track position in 1980.[22] Her performance was reviewed in 1982, at which time she received a contract extension and renewal for three years, which brought her up for tenure review in 1985.[23] She was denied tenure on March 29, 1985, by a departmental panel that questioned her scholarly independence, commitment to research and mastery of her field.[24]

At the time of her tenure review, Dr. Fisher had seven peer-reviewed publications and a completed manuscript, which was subsequently published in a peer-reviewed journal.[25] She had secured three financial grants to support this work prior to accepting her position with Vassar College.[26] While at Vassar, she secured five grants from the National Science Foundation, as well as several intramural grants.[27] Dr. Fisher also had consulships with the National Science Foundation and the National Institutes for Health.[28]

B. District Court Decision

On June 14, 1993, Dr. Fisher, then a faculty member of Vassar College, filed a suit against Vassar College in the Southern District of New York alleging violations of Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act.[29] After a bench trial, the district court held that Fisher established that (1) she was denied tenure in violation of Title VII, (2) she was denied tenure in violation of the ADEA because of her age, and (3) she was denied equal pay for equal work.[30]

The district court further held that, because of the Title VII violations based on the finding of gender discrimination and attorney's fees and costs, Fisher was entitled to recover back pay from

21. *See id.*
22. *See id.* at 1214.
23. *See id.*
24. *See id.* at 1193, 1209.
25. *See id.* at 1198.
26. *See id.* at 1202.
27. *See id.*
28. *See id.* at 1205.
29. *See id.* at 1193.
30. *See id.* at 1193-94. The court held that Vassar discriminated against Fisher based on a "sex-plus" analysis because of her status as a married woman. A "sex plus" analysis means that the discrimination was not only motivated by Fisher's gender, but also because she was married. *See id.* at 1225.

the time she was discharged in 1986 until the present.[31] She was also entitled to recover double damages under the Equal Pay Act and ADEA.[32] Furthermore, the court ordered that Dr. Fisher was entitled to reinstatement as an Associate Professor of Biology at Vassar, but after two years, she would be subject to the college's evaluation process.[33]

C. *Appeal and Cross-Appeal*

Both Fisher and Vassar College appealed the district court's decision.[34] Vassar argued that the district court committed reversible error, and based its appeal on three grounds.[35] First, Vassar argued that Dr. Fisher had failed to sustain her burden of proving intentional discrimination.[36] Second, the statistical proof relied on by the court was fundamentally flawed and clearly erroneous.[37] Third, the district court's findings as to the age discrimination claim and the violation of the Equal Pay Act, along with the resultant remedies imposed, all constituted reversible error.[38]

Dr. Fisher's cross-appeal was predicated on two grounds.[39] First, the district court erroneously failed to rule, based upon the facts actually found by the court, that there was a prima facie case of "simple" sex discrimination.[40] Second, Fisher claimed that the court erred in an attempt to make Dr. Fisher "whole" by granting relief in the form of her reinstatement as an Associate Professor of Biology with tenure for a period of two years, only thereafter to subject her to an evaluation process similar to the one that initially led to the lawsuit.[41]

D. *Second Circuit Decision*

On September 7, 1995, the Second Circuit dismissed Fisher's

31. *See id.* at 1234.
32. *See id.*
33. *See id.* at 1235.
34. *See* Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995), *rev'd en banc*, 114 F.3d 1332 (2d Cir. 1997).
35. *See id.* at 1426.
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*

lawsuit.[42] The court vacated the judgments of the district court, and held that the district court's conclusions of liability on the sex discrimination claim, the age discrimination claim, and the Equal Pay Act claim were clearly erroneous.[43] The court concluded that Dr. Fisher was not entitled to attorney's fees since none of the claims were successful.[44] Furthermore, the court affirmed the district court's rejection of Fisher's "simple" sex discrimination claim, and therefore held that it was not necessary to address Fisher's cross-appeal regarding the terms of her reinstatement.[45]

E. The Second Circuit En Banc Decision

The Second Circuit, sitting en banc, sustained the district court's findings that Fisher had established a prima facie case of sex-plus discrimination and age discrimination.[46] However, the panel found the evidence insufficient to support a finding that Vassar actually had discriminated against her based on these claims, and reversed the district court's decision.[47]

The en banc majority explained that in the area of employment discrimination, a finding of pretext against the employer, together with a prima facie case, still does not insulate a finding of discrimination: "We may reverse a district court's finding of discrimination—even if accompanied by a supportable finding of pretext—if we are firmly convinced, as the panel was here, that a mistake has been made and that the plaintiff has failed to establish intentional discrimination by a preponderance of the evidence."[48] In so holding, the en banc majority disagreed with the dissent's suggestion that a finding of pretext almost always supports a finding that the employer's true motivation was discriminatory.[49]

F. Appeal to Supreme Court

The Supreme Court denied Fisher's appeal.[50] As a result of the

42. *See id.* at 1420, 1454.
43. *See id.* at 1454.
44. *See id.*
45. *See id.*
46. *See Fisher*, 114 F.3d at 1345.
47. *See id.* at 1345, 1347.
48. *Id.* at 1340.
49. *See id.* at 1331.
50. Fisher v. Vassar College, 118 S. Ct. 851 (1998).

order, Dr. Fisher will be out of her teaching position at Vassar College permanently.

III. THE SUPREME COURT'S TREATMENT OF THE BURDEN OF PROOF IN DISCRIMINATION CASES

A. The Evolution of the Supreme Court's Pretext Discussion

Dr. Fisher's case presents a legal issue that has troubled the Supreme Court since Congress enacted Title VII of the Civil Rights Act of 1964, which allows actions to be brought for employment discrimination. The Court first laid the foundation for the elements required to bring a prima facie employment discrimination case based on circumstantial evidence in *McDonnell Douglas Corp. v. Green.*[51] In *Texas Department of Community Affairs v. Burdine*, the Court first addressed the issue of pretext. The Court advocated the pretext only position that a finding of pretext was sufficient, and that the plaintiff had no burden to prove intentional discrimination by the employer.[52] The issue of pretext was complicated in 1993 in *St. Mary's Honor Center v. Hicks* when the Supreme Court held that the plaintiff must not only prove pretext by the employer, but also must actually prove intentional discrimination by the employer.[53] How the plaintiff is to prove intentional discrimination in the absence of direct evidence remains to be clarified by the Supreme Court.

B. McDonnell Douglas Corp. v. Green: The Prima Facie Standard for Employment Discrimination Cases

In *McDonnell Douglas*, the plaintiff, a black civil rights activist, engaged in disruptive and illegal activity against his employer, McDonnell Douglas Corporation, and was subsequently discharged.[54] When McDonnell Douglas advertised for qualified personnel and rejected the plaintiff's reemployment application on the ground of illegal conduct, the plaintiff sued claiming violation of provisions of the Civil Rights Act of 1964.[55] The Supreme Court held that, although the plaintiff proved a prima facie case under Title VII,

51. 411 U.S. 792 (1973).
52. 450 U.S. 248 (1981).
53. 509 U.S. at 502, 519-20.
54. 411 U.S. at 792.
55. *See id.*

McDonnell Douglas provided a rebuttable presumption by stating that it rejected the plaintiff because of his unlawful conduct.[56] The Court concluded that McDonnell Douglas' reason met its burden to rebut the plaintiff's prima facie case of discrimination.[57]

The Supreme Court first described the elements a plaintiff must prove to establish a prima facie discrimination case under Title VII in *McDonnell Douglas*.[58] The prima facie route is designed for plaintiffs who do not have direct evidence of discrimination, and consists of a burden-shifting framework.[59] In the first stage, the plaintiff has the burden of showing a prima facie case to create a presumption of discrimination.[60] Once shown, the burden shifts to the defendant to articulate a legitimate, business-related reason for the difference in treatment,[61] a burden that the Supreme Court has characterized as easy to meet.[62] The burden then shifts back to the plaintiff for the third stage, sometimes called the pretext stage, when the plaintiff must show that the defendant's proffered reasons are unworthy of credence, for example, mere pretexts for an underlying discriminatory motive.[63]

Rather than a mere procedural threshold, the prima facie case now serves as a rough introduction to the merits of the action. The prima facie case emerged from *McDonnell Douglas* as a four-pronged test: an aggrieved plaintiff must show that (1) he is a member of a protected class; (2) he was qualified for the position for which he was not hired, retained, or offered promotion; (3) despite his qualifications, he was rejected; and, (4) after he was denied the position, the post either remained open or was filled by someone not a member of the protected class.[64] Because the purpose of the prima facie case is to create a rebuttable presumption of discrimination, the requirements described above are supposed to be de minimis.[65]

56. *See id.*

57. *See id.* at 803.

58. *See McDonnell Douglas*, 411 U.S. at 801; (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2003-17 (1988 & Supp. V 1996) [hereinafter Title VII].)

59. The "direct evidence" case, drawn from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), occurs when a plaintiff produces direct evidence of discrimination and shows by a preponderance of the evidence that she suffered disparate treatment.

60. *See McDonnell Douglas*, 411 U.S. at 802.

61. *See id.* at 802.

62. *See Burdine*, 450 U.S. at 254-56.

63. *See Hicks*, 509 U.S. 502, 511-12. To prove pretext, a plaintiff may rely on indirect evidence such as disparaging comments and other circumstantial pieces of information.

64. *See McDonnell Douglas*, 411 U.S. at 802.

65. *See Hicks*, 509 U.S. at 510-12.

Additionally, the elements of the prima facie case are flexible, although its purpose remains constant in employment discrimination cases. "While its elements will vary depending on the circumstances of the case, the fundamental purpose of the prima facie case is to require the plaintiff to show (1) that an adverse employment action occurred, and (2) that the most common explanations for an adverse employment action, such as incompetence, are not applicable."[66]

C. *Texas Department of Community Affairs v. Burdine: The Development of the Defendant's Burden of Proof for Pretext*

In *Burdine*, the plaintiff, a female accounting clerk, sued the Texas Department of Community Affairs alleging that she was denied a promotion and was terminated because of her sex.[67] The Supreme Court held that, "when the employee had proved a prima facie case of employment discrimination, the employer bore only the burden of explaining clearly the nondiscriminatory reasons for its actions and bore no burden of persuading the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment existed."[68] The court also held that "there was no requirement that the employer hire a minority or female applicant whenever that person's objective qualification was [sic] equal to those of a white male applicant."[69]

In *McDonnell Douglas,* the Court shifted the burden of proof to the defendant after the plaintiff established a prima facie case.[70] In *Burdine*, the court clarified the standard for the burden of proof for the defendant employer when the unanimous Court, speaking through Justice Powell, said that the ultimate burden of persuasion remained with the plaintiff.[71] Under *Burdine*, satisfaction of the defendant's burden serves two functions: it deflates the evidentiary presumption of the prima facie case and sharpens the issues for litigation by calling forth all the defendant's arguments for the plaintiff to challenge.[72] As a result, the defendant's burden is light

66. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 776 (8th Cir. 1995) (citing Krinik v. County of Le Sueur, 47 F.3d 953, 958 (8th Cir. 1995)).

67. *See Burdine*, 450 U.S. at 248.

68. *Id.*

69. *Id.*

70. *See McDonnell Douglas*, 411 U.S. at 801.

71. *Id.* at 254-56.

72. *Id.* at 255-56. The Court noted that the defendant's evidence must be clearly articulated and admissible as evidence at trial; indeed, if left unaddressed, this should be "legally sufficient to justify a judgment for the defendant." *Id.* at 255.

and requires only an explanation of the nondiscriminatory reasons for his actions. The defendant does not have to provide evidence of any other reasons for his actions.

D. *St. Mary's Honor Center v. Hicks*: *The Permissive Passage of Hicks and the Pretext Only Versus Pretext Plus Debate*

As the Court made clear in *Hicks*, the defendant's burden of proof is light.[73] Indeed, the defendant's burden of proof is little more than a mechanical formality; a defendant, unless silent, will almost always prevail.[74] The Supreme Court also determined that credibility assessments for the employer will be evaluated when the plaintiff rebuts the employer's proffered reasons for its action, and not when the defendant rebuts any legal presumption of intentional discrimination.[75] An absurd justification for firing a worker, for example, will not fail at the second, but rather at the third stage of the pretext framework.

In *Hicks*, the petitioner, a black man, worked as a correctional officer at St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources.[76] The plaintiff brought a Title VII action, alleging that the defendant demoted and discharged him because of his race.[77] The Supreme Court held that the court of appeals' rejection of St. Mary's asserted legitimate, nondiscriminatory reasons for its challenged actions did not entitle the plaintiff to a judgment as a matter of law under the *McDonnell Douglas* framework since the plaintiff bears the ultimate burden of persuasion of a violation of Title VII.[78]

The greatest development and controversy for the Supreme Court involves the pretext stage: whether the plaintiff's exposure of the defendant's explanations as pretextual constitutes a finding of discrimination, or whether the plaintiff must show pretext "plus" affirmative indicia of discriminatory animus.[79] The Court's purported

73. *See Hicks*, 509 U.S. at 510.

74. If the defendant cannot produce a legitimate business reason for an adverse decision, the plaintiff is entitled to judgment as a matter of law. *See id.* at 509.

75. "In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment." *Id.* at 509.

76. *Id.* at 502-504.

77. *See id.* at 502.

78. *See id.* at 511.

79. *See id.* at 502.

resolution of the issue in *Hicks* favored pretext plus (i.e., pretext plus proof of the employer's discriminatory animus).[80] However, the 5-4 decision in *Hicks* demonstrated the complexity of the pretext issue because the justices disagreed on the quantum of evidence needed to satisfy the additional requirement of discriminatory intent.[81]

This pretext plus versus pretext only debate stemmed from Justice Scalia's "permissive passage" for the majority about evidence required to prove discriminatory animus:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, *suffice* to show intentional discrimination. Thus rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .[82]

This "permissive passage" casts considerable doubt on whether the *Hicks* majority intended to adopt the pretext plus position in its strictest form:[83] pretext only is never sufficient to permit a finding of discrimination.[84] If anything, the ruling seems to reject a finding of mechanical pretext only because the Supreme Court said that "the factfinder's belief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." This statement seems to reject the pretext only position that a finding of pretext by the defendant is sufficient to make a finding of discrimination without requiring the plaintiff to prove discriminatory intent by the employer (the "plus" in pretext plus). Instead, the statement is ambiguous and implies that sometimes the factfinder's disbelief of the defendant's reasons (i.e., that there is a pretext) can result in a finding of discrimination, but the statement does not mandate a finding of discrimination, as the pretext only position would require. Therefore, *Hicks* does not preclude pretext plus courts from retaining their additional burdens in cases where the plaintiff must prove pretext plus intentional discrimination.

The *Hicks* dissent, written by Justice Souter, strongly disagreed

80. *Id.*

81. *Id.* at 511.

82. *Id.* (emphasis added to "may" and "suffice") (emphasis to "permit" in original). This "permissive" passage has been quoted by almost every circuit court that has interpreted *Hicks* scope. *See* Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1273-75 (1994).

83. *See id.*

84. *See id.*

with Justice Scalia's opinion, accusing the majority of ignoring language in both *McDonnell Douglas* and *Burdine*.[85] The dissent's main concern with the majority's ruling was that the plaintiff was stripped of the use of circumstantial evidence to prove evidence of intentional discrimination.[86] Justice Souter severely criticized the majority for requiring that the plaintiff in a Title VII case disprove "all possible nondiscriminatory reasons that a factfinder might find lurking in the record."[87]

The dissent further criticized the majority's position because "its scheme places an employer who lies in a better position than an employer who says nothing."[88] The dissent reasoned that "[u]nder the majority's scheme, the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions, will win its case and walk away rewarded for its falsehoods."[89] The dissent did not think that Title VII should be driven by concern for employers who are dishonest in court "at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent."[90]

New questions have arisen from the reading of *Hicks* based on Justice Scalia's permissive passage that could be interpreted as saying that a showing of pretext "may always" permit a judgment for the plaintiff—the pretext only position.[91] Just as the *Hicks* majority construed "pretext" as shorthand for "pretext for discrimination," another court could infer from "may always" the position that a showing of pretext "may always" permit a judgment for the plaintiff.[92]

Lower courts have wrestled with the Court's language in the permissive passage—that the factfinder "may" infer discrimination on a showing of pretext only—leading to several possibilities for

85. *Hicks*, 509 U.S. at 526, 533 (Souter, J., dissenting).

86. "[T]he majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent." *Id.* at 534 (Souter, J., dissenting).

87. *Id.* at 534-535 (Souter, J., dissenting).

88. *Id.* at 540 n.13 (Souter, J., dissenting).

89. *Id.* (Souter, J., dissenting).

90. *Id.* at 543 (Souter, J., dissenting).

91. *Id.* at 511.

92. *Id.* "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, *suffice* to show intentional discrimination." *Id.* (emphasis added to "may" and "suffice") (emphasis to "permit" in original). This statement in the "permissive passage" could be interpreted as saying that a showing of pretext may always permit a judgment for the plaintiff.

interpreting the passage.[93] For example, the factfinder could decide to infer discrimination on the prima facie case and pretext only.[94] The factfinder could also interpret the permissive language in the passage as establishing a legal standard from which courts are free to depart.[95] Either interpretation is possible since both seem plausible; the issue is somewhat confusing and has led to sharp disagreements between judges as evidenced by the disagreement between the majority and dissenting justices in *Fisher*.[96]

IV. NEITHER THE PRETEXT ONLY NOR PRETEXT PLUS POSITIONS IN FISHER SHOULD BE STRICTLY ADOPTED SINCE BOTH POSITIONS CONSTRAIN THE COURT'S REASONING AND LIMIT THE COURT'S DECISION

The key disagreement between the en banc majority and the dissenting justices in *Fisher* lies in the realm of the pretext plus and pretext only positions.[97] Although the conflict seems minimal when applied to cases where there is overt evidence of discriminatory animus, the circumstances in *Fisher* heighten the conflicts inherent within both positions. In *Fisher*, one could argue that discrimination or the faculty's dislike for Dr. Fisher resulted in Dr. Fisher's denial of tenure.[98] Consequently, the rigidity of both the *Fisher* en banc majority and the dissenting opinions in adhering to the pretext only and pretext plus ideologies constrain the justices' reasoning.[99] This rigidity also creates confusion for district courts when determining how to apply a sustainable finding of pretext to employment discrimination cases because of the debate.[100]

The *Fisher* en banc majority was too quick to conclude that a finding of a prima facie case of discrimination and a sustainable finding of pretext by the employer is not sufficient to constitute a finding of employment discrimination.[101] The majority stated that it was limiting its en banc consideration to the issue of "whether a finding of discrimination that is based on a prima facie case and a

93. *See Fisher*, 144 F.3d at 1332.
94. *See id.*
95. *See id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See id.*
101. *Id.*

supportable finding of pretext may be reversed on appeal as clearly erroneous, or whether such a finding must be upheld absent some . . . evidence that the employer took the adverse action for some other non-discriminatory reason."[102] This issue was not in question, however, since the Supreme Court held findings of discrimination are subject to such review.[103]

Instead, the key issue in *Fisher*, as identified by Chief Justice Newman in his dissent, is the significance a court should give to a sustainable finding of pretext.[104] Chief Justice Newman describes several possible ways the court can interpret a sustainable finding of pretext, focusing on the weight that it should have as evidence of discrimination: "Does [a sustainable finding of pretext] point toward discrimination, but with only minimal probative force, as perhaps some believe? Or does it point toward discrimination with strong probative force, at least in the absence of evidence that blunts such probative force?"[105] As Chief Justice Newman points out, the majority's ambiguity about the weight a sustainable finding of pretext plays in a finding of discrimination provides no guidance for lower courts about how much probative value the court should give to a finding of pretext.[106] As a result, the majority's reasoning is confusing and provides unclear guidelines about the role a sustainable finding of pretext should play in employment discrimination cases in the Second Circuit.

The dissenting opinions in *Fisher* are somewhat unclear on the issue of what role a finding of pretext should play in determining whether Vassar College was guilty of discrimination. In contrast to the majority, the dissent advocates a pretext only position, which would find that a sustainable finding of pretext and a prima facie case are enough to uphold a finding of discrimination even when a possible third explanation for the employer's behavior could prove the employer's true motive was not discriminatory.[107] The problem with the dissent's strict reading of a pretext only position is that cases exist where an employer can have a legitimate, nondiscriminatory reason for dismissing an employee that is different from the

102. *Id.* at 1334.
103. *See id.* at 1362.
104. *Id.* at 1379 (Newman, J., dissenting).
105. *Id.* (Newman, J., dissenting).
106. *See id.* (Newman, J., dissenting).
107. *See id.* at 1373 (Newman, J., dissenting).

pretextual reason being offered.[108] For example, in *Hicks*, St. Mary's stated that they fired the plaintiff because of his severe accumulation of rule infractions.[109] However, the Supreme Court remanded the case to determine if the true reason for Hicks' dismissal was personal animosity between him and his boss—a third viable nondiscriminatory reason for the defendant's action, but different from the explanation the defendant originally offered.[110] As a result, a viable reason existed for St. Mary's dismissal of the plaintiff other than discrimination and the pretextual reason offered by St. Mary's.

Just as reasons other than discrimination existed for the dismissal of the plaintiff in *Hicks*, three possible reasons existed for the plaintiff's tenure denial in *Fisher*: illegal discrimination, which Dr. Fisher alleged; universal dislike of Dr. Fisher by the faculty; and the pretextual reason, insufficient academic publication, which the defendant offered to satisfy its burden of production.[111] Had Dr. Fisher successfully shown that the publication excuse was pretextual, she could not have prevailed under the *Hicks* majority's pretext plus view without a showing that it was also a pretext for discrimination.[112] However, under the *Hicks* dissent's strict pretext only position, Fisher would have won automatically because the court would infer a finding of discrimination since the publication reason was a pretext.[113] Yet, if the real reason Fisher was not granted tenure was not discriminatory, but because the faculty did not like her, the pretext only strict interpretation of the evidence would be incorrect because she would not have received tenure based on a legitimate nondiscriminatory reason.[114] Again, the problem is highlighted by the dissent's adherence to the strict pretext only position that a sustainable finding of pretext and the prima facie case are enough to infer a finding of discrimination even when another plausible explanation is available to explain St. Mary's actions. Specifically, the fact that the faculty did not like Dr. Fisher.

108. For example, Vassar said that Dr. Fisher was not well-liked by the faculty, which is a legitimate reason for denying tenure and is nondiscriminatory.

109. *Hicks*, 509 U.S. at 529.

110. *See id.* at 524.

111. *Fisher*, 114 F.3d at 1426, 1435, 1437.

112. *See id.*

113. *See id.*

114. *See id.*

V. BECAUSE THE *HICKS* DECISION IS OPEN TO TWO DIFFERENT INTERPRETATIONS, THE PRETEXT DEBATE HAS NOT BEEN RESOLVED AND BOTH THE PRETEXT PLUS AND PRETEXT ONLY POSITIONS CAN BE JUSTIFIED BASED ON HOW THE LOWER COURTS INTERPRET *HICKS'* PERMISSIVE PASSAGE

The majority in *Fisher* relied on the *Hicks* decision to justify its position that Fisher failed to prove that Vassar's true reason for denying her tenure was because of discriminatory animus.[115] The majority adopted the pretext plus view that Fisher needed to prove not only that Vassar's proffered reason was pretextual, but also that its true reason for its action was discriminatory.[116] What is not clear from *Fisher*, however, is which interpretation of *Hicks* the *Fisher* majority adopted. Lower courts applied *Hicks* in two key interpretations, a broad interpretation of the pretext plus view, and a narrower interpretation. Both interpretations are helpful in understanding the rationale underlying the *Fisher* court's reasoning, and both interpretations have implications for the *Fisher* decision.

One possible broad interpretation of *Hicks* is that it is an affirmation of the pretext plus position, namely that a showing of pretext is never sufficient to sustain the plaintiff's burden of proof unless combined with additional evidence of discriminatory intent.[117] Textual support for this reading is found in the language of *Hicks* that appears to require a dual evidentiary showing from the plaintiff. For example, Justice Scalia wrote that a "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason."[118] He also said that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."[119] Clearly, Justice Scalia and the *Hicks* majority believe that a finding that the employer lied about its reasons for its action is not the equivalent of a finding of unlawful discrimination by the employer.

This broad interpretation also finds support in portions of the opinion that denigrate the probative value of the prima facie case,

115. *Id.* at 1332.
116. *See id.* at 1339.
117. *See Development*, *supra* note 7, at 1580.
118. *Hicks*, 509 U.S. at 515.
119. *Id.* at 514-515.

suggesting that a prima facie showing is merely a procedural ordering of the production of the evidence. For example, Justice Scalia wrote that, once the employer rebuts the presumption of discrimination, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[120] Therefore, after the initial proffering of evidence, the only remaining issue for the court is whether the plaintiff proved discrimination by the employer. The *Hicks* majority also stated that after the second stage of the *McDonnell Douglas* framework, the inquiry then moves from "the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation."[121] These comments indicate that the prima facie case and proof of pretext do not have much value in and of themselves, but only serve as procedural steps along the way to establishing the ultimate issue of discrimination.

An alternate interpretation of *Hicks* is that the holding of the opinion is much narrower in scope. Rather than establishing an additional burden of proof for the plaintiff, the opinion merely reverses the Eight Circuit's holding in *Hicks* that a prima facie case plus a showing of pretext compels a judgment for the plaintiff as a matter of law.[122] Under this narrower or permissive inference interpretation, proof of the prima facie case and pretext permits the factfinder to infer discrimination, although it does not mandate such a judgment.[123] Courts that interpret the opinion in this way rely on the permissive passage.[124] If this is the proper interpretation of *Hicks*, then the Supreme Court adopted a position that falls between the requirements of pretext only and pretext plus: although not entitled to a judgment as a matter of law upon proof of a prima facie case and pretext, a plaintiff may prevail without having to introduce additional evidence of discrimination.

What the *Hicks* decision makes clear under both the broad interpretation of the pretext plus view and the narrower interpretation, is that, even if a court infers discrimination from the plaintiff's prima facie case and pretext, it still must make a specific finding of intentional discrimination in order for the plaintiff to carry

120. *Id.* at 510. "[T]he McDonnell Douglas presumption is a procedural device, designed only to establish an order of proof and production." *Id.* at 521.

121. *Id.* at 516.

122. St. Mary's Honor Ctr. v. Hicks, 970 F.2d 487, 492 (8th Cir. 1992).

123. *See Development, supra* note 7, at 1581.

124. *See supra* text accompanying notes 82, 92.

its ultimate burden.[125] The requirement of a specific finding of intentional discrimination reflects two conclusions developed in Justice Scalia's opinion. First, such a finding is mandated because the majority recognized a distinction between proof of pretext and proof of intentional discrimination.[126] Because the majority did not equate "the required finding that the employer's action was the product of unlawful discrimination" with the "much different (and much lesser) finding that the employer's explanation of its action was not believable,"[127] the factfinder must specifically state that it draws from the evidence of pretext an inference of discrimination.[128] Second, as Federal Rule of Evidence 301 makes clear, the plaintiff at all times retains the ultimate burden of proving intentional discrimination.[129] Requiring the district court to make the specific finding of intentional discrimination avoids speculation as to whether or not the plaintiff carried this burden.

The permissive inference or narrow reading of *Hicks* gained favor as the correct interpretation in the Second Circuit.[130] In *DeMarco v. Holy Cross High School*[131], the plaintiff, a teacher at a Catholic school, claimed that he was dismissed because of his age.[132] Describing the issues presented under an age discrimination claim, the Second Circuit interpreted the holding of *Hicks* to support a permissive inference position:

> [t]he Supreme Court recently held . . . that the mere fact that a defendant proffers a false reason for a challenged employment action does not necessarily establish liability. Proof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent, but does not compel such a finding.[133]

125. Justice Scalia emphasized this requirement in his opinion stating that "[e]ven though . . . rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." *Hicks*, 509 U.S. at 511 n.4.

126. *See id.* at 514-515.

127. *Id.*

128. *See id.*

129. "[A] presumption . . . does not shift . . . the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

130. *See Development*, *supra* note 7, at 1579.

131. 4 F.3d 166, 168 (2d Cir. 1993).

132. The district court dismissed the plaintiff's claim because consideration of the case would result in excessive entanglement in religion. *See id.* at 169. The Second Circuit reversed and concluded that the issues arising under an age discrimination claim do not give rise to First Amendment claims. *See id.* at 166.

133. *Id.* at 170.

The Second Circuit also articulated this interpretation of *Hicks* in *Saulpaugh v. Monroe Community Hospital.*[134] The Second Circuit said, "[i]n some instances, as Justice Scalia notes, a plaintiff may meet this ultimate burden of proof by combining her proof of the elements constituting a prima facie case with evidence that defendant's proffered reasons for its acts were false."[135] Both of these cases demonstrate that the Second Circuit favors the permissive inference approach, which falls between the pretext plus and pretext only positions, by allowing a plaintiff to sometimes prove discrimination by showing the defendant's proffered reasons to be false, without always forcing the court to infer that the employer's reasons were discriminatory.

VI. THE SUPREME COURT'S RATIONALE IN *HICKS* AND *FISHER*

A. The Fisher Majority and Dissent Misconstrue Hicks By Failing to Acknowledge that More Than One Viable Interpretation of Hicks Exists

Both the *Fisher* majority and dissenting opinions rely on *Hicks*.[136] However, as discussed earlier, *Hicks* is open to two interpretations, namely the permissive inference or narrow interpretation and the pretext plus position, which are both persuasive. Because neither the *Fisher* majority nor dissenting opinions acknowledge that more than one viable interpretation of *Fisher* exists, both the majority and dissenting opinions in *Fisher* can be criticized for not interpreting *Hicks* more broadly. Both the *Fisher* majority and dissent also falter for limiting their perspectives to the constraints of their own positions, without at least discussing other possible interpretations of *Hicks.*

The *Fisher* majority believed that the pretext only position adopted by the dissent was wrong: "[w]e simply disagree with the dissent's suggestion that a finding of pretext in all but a few specified categories of cases reasonably supports a finding of discrimination, as the true motivation."[137] The majority added that "[t]he main thrust of the [*Hicks*] decision as [they] read it, is that once the minimal prima

134. 4 F.3d 134, 135 (2d Cir. 1993).

135. *Id.* at 142. Because the plaintiff had introduced substantial direct evidence of retaliation, however, the decision did not rest upon the issue of pretext. *See id.* at 141-42.

136. *Fisher*, 114 F.3d at 1343.

137. *Id.* The majority went on to justify its pretext plus decision through reliance on Justice Scalia's opinion in *Hicks*. *See id.*

facie case has served its purpose of forcing the employer to proffer a reason, all presumptions drop out and the case proceeds like any other, i.e., with the burden on plaintiff to prove the case by evidence of discrimination."[138] In contrast, the dissent points to Justice Scalia's opinion to justify its pretext only position: "Justice Scalia does not doubt that a proffered explanation found by a factfinder not to be the reason believed by the defendant, is a pretext, and (whether perjurious or not) supports an inference, when coupled with the facts of a prima facie case, that the true reason was discrimination."[139]

If the *Fisher* majority and dissenting opinion acknowledged that more than one possible interpretation for *Hicks* exists, then both opinions would be more coherent and stronger. Instead, by refusing to analyze the varying interpretations of *Hicks*, the *Fisher* majority and dissent constrain their reasoning and reduce their decisions to rhetoric. In addition, both the majority and dissenting opinions simplify the pretext debate and limit it within the constructs of positions that reflect the justices' own opinions about the role of pretext, rather than reflecting upon the merits of Fisher's case. As a result, both the majority and dissenting opinions demonstrate problems that arise when adherence to a particular doctrine weakens the justices' conclusions and undermines their positions.

B. The Consequences of Both Hicks and Fisher for Employment Discrimination Cases

Hicks and *Fisher* will have important consequences for future employment discrimination cases. Both decisions will impact whether or not the courts adopt a pretext plus, or a pretext only position in determining what effect a sustainable finding of pretext will have on a determination of discrimination. Both decisions suggest that the burden will be harder on plaintiffs. Further, as many legal commentators have noted, the decisions will have future lingering consequences such as failing to provide guidance to lower courts on the proper role of pretext in employment discrimination cases, chilling potential plaintiffs from bringing claims, and affecting summary judgment decisions. Ultimately, the long-term consequences of the *Fisher* and *Hicks* decisions illustrate the problems that exist when the court adopts a narrow interpretation of

138. *Id.*
139. *Id.* at 1372.

the law based on a pretext plus or pretext only position.

One view espoused by supporters of the *Hicks* majority argues that the pretext plus position will not preclude plaintiffs from being successful in employment discrimination cases and will actually help to clarify the process for successfully bringing a claim.[140] In *St. Mary's Honor Center v. Hicks: The "Pretext Maybe" Approach*, one commentator suggests that *Hicks* is not an obstacle for plaintiffs: "*Hicks* . . . is not a death knell for Title VII plaintiffs, but merely a clarification of a framework which assists the plaintiff with an inference of discrimination, while correctly insisting that the plaintiff's ultimate burden is carried only by proving discrimination."[141]

Support of the *Hicks* majority's standard of the burden of proof for plaintiffs is somewhat problematic for the *Fisher* majority since the majority did not adequately provide a framework for determining how lower courts should weigh a sustainable finding of pretext in the Second Circuit. As identified by Chief Justice Newman in his dissent, the majority fails to provide clear guidelines for lower courts about what role a sustainable finding of pretext should play in a finding of discrimination.[142] Because the *Fisher* majority did not provide guidance for lower courts about the proper role of pretext, lower courts in the Second Circuit will continue to be confused and rely on the pretext plus and pretext only positions to justify their decisions, without fully explaining the rationale for their decisions. The lack of direction from the *Fisher* majority will create a lingering negative effect in that the lower courts will continue to adhere to hard-line positions without proper justification or precedent, which will lead to more overall confusion on the issue of pretext.

Critics of the *Hicks* majority have asserted that the decision thwarts the intent of Title VII. In *St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII by Rejecting "Pretext Only?,"* another commentator argues that "[t]he holding in *Hicks* gives the employer a distinct advantage by rejecting the 'pretext only' rationale and forcing the employee to go beyond the proof of falsity of the defendant's proffered reasons."[143] The

140. *See, e.g.*, Michael J. Lambert, Comment, *St. Mary's Honor Ctr. v. Hicks: The "Pretext Maybe" Approach*, 29 NEW ENG. L. REV. 163, 207 (1994).

141. *Id.*

142. *See Fisher*, 114 F.3d at 1379 (Newman, C.J. dissenting).

143. Louis M. Rappaport, Note, *St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII by Rejecting "Pretext Only?,"* 39 VILL. L. REV. 123, 159 (1994).

commentator further argues that the pretext only position will have long-term negative consequences for discrimination, particularly for civil rights.[144]

The concerns raised regarding the effect of pretext on civil rights, and the burden of proof for employees, reflect serious consequences that could result from *Fisher* and *Hicks*. While the *Fisher* majority did not intend to prevent plaintiffs like Fisher from bringing employment discrimination claims, the decision could chill zealous advocacy on behalf of plaintiffs who have been discriminated against in the workplace because of the majority's strict adherence to the pretext plus position. As a result, if a potential plaintiff does not have strong circumstantial or direct evidence that an employer's proffered reason for its action is discriminatory, the plaintiff may decide not to pursue a claim based on the *Fisher* majority's pretext plus position and its tough burden for plaintiffs.

As legal commentators have also suggested, the purpose of Title VII is to deter discriminatory behavior by employers, a purpose that is complicated by *Hicks*.[145] This criticism of *Hicks* is also applicable to the *Fisher* majority because the majority's strict adherence to the pretext plus doctrine runs counter to the purpose of both Title VII, and of the general policy of eradicating discriminatory conduct in the workplace. In addition, the reluctance of potential plaintiffs to file suit for employment discrimination claims will run against the purpose of Title VII, which is to provide a remedy to employees who have been discriminated against.[146] All of the potentially negative consequences stemming from *Hicks* and *Fisher* and the strict adherence to the pretext plus position demonstrate the danger of conforming to a narrow interpretation of discrimination.

Hicks and *Fisher* will also affect the decisions of summary judgment motions. One advantage of the pretext only position espoused by the *Fisher* dissent is that the employer will not prevail on a motion for summary judgment.[147] Arguably, under a pretext plus analysis, a defendant's motion for summary judgment will be granted in cases where the plaintiff has shown only that the defendant's explanation conceals discriminatory animus.[148] Under a pretext only analysis, summary judgment is not appropriate because a factual issue

144. *See id.* at 159.
145. *See id.* at 161.
146. *See id.* at 161.
147. *See* Odell, *supra* note 82, at 1251.
148. *See id.*

has been raised—namely, whether the plaintiff's rebuttal proof coupled with prima facie evidence demonstrates pretext for discrimination.[149] Although plaintiffs may be able to withstand a summary judgment motion by employers, as *Fisher* demonstrates, a plaintiff will still have a tough time meeting the burden under the pretext plus position, which could result in a judgment for the employer.

The *Hicks* and *Fisher* majorities' adherence to the pretext plus position will have negative consequences in several respects. The lower courts will not have any clear guidelines about how to evaluate a sustainable finding of pretext, which will lead to more confusing decisions. Potential plaintiffs will be deterred from bringing claims based on the higher burden of proof set forth by *Hicks* and *Fisher*, and based on the fear that employers could take retributive action against potential plaintiffs. In addition, both *Hicks* and *Fisher* will chill litigation by plaintiffs and undermine the purpose of Title VII to provide a remedy to people who are discriminated against in the workplace. Also, the *Hicks* and *Fisher* majorities and dissents strict positions demonstrate how rigid adherence to the pretext plus or pretext only views can miss important considerations that do not adhere to their hard-line positions. Instead, the *Hicks* and *Fisher* courts fail to consider the consequences of their decisions, which can affect future litigation by plaintiffs, summary judgment motions, and future decisions by lower courts on the issue of pretext.

CONCLUSION

The majority and dissenting opinions in *Fisher* both advocate strict interpretations of the pretext only and pretext plus positions for deciding the validity of a finding of discrimination in employment discrimination cases. Although the majority and dissent disagree on the outcome of the case, their strict adherence to the dogma of each respective position undermines the reasoning of their conclusions. Ultimately, both the majority and the dissent in *Fisher* show the advantage to applying a more flexible view of interpreting a sustainable finding of pretext in an employment discrimination case when more than one motive exists for the employer's actions.

In addition, the lingering negative consequences from the *Hicks* and *Fisher* courts' adherence to the pretext plus and pretext only

149. *See id.*

doctrines further illustrate the dangers that result from limiting a decision to one position. Some of the important considerations the *Hicks* and *Fisher* decisions failed to consider include: chilling potential claims by plaintiffs, negatively affecting summary judgment motions, providing little guidance to lower courts about the proper role of a sustainable finding of pretext, and undermining the purpose of Title VII. Ultimately, both *Hicks* and *Fisher* provide examples of courts that would rather adhere to a strict position on the issue of pretext, instead of providing new solutions to the rigid views that created the problems in the first place. What both *Fisher* and *Hicks* do show is that neither the pretext only nor the pretext plus view is completely satisfactory as a bright-line rule for deciding how to evaluate pretext in employment discrimination cases. Thus, the Supreme Court and the Second Circuit should strive to provide some guidance to clarify the pretext debate in future employment discrimination cases.